Sri Alam Sdn Bhd v Newacres Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–660–95
SHAIK DAUD, SITI NORMA YAAKOB AND ABDUL MALEK AHMAD JJCA
3 JULY AND 16 JULY 1996

Civil Procedure *— Judgments and orders — Inconsistency in court order — Main purpose of order to be ascertained — Whether court ought to ignore the later part of the order to give effect to the earlier part of the order*

Civil Procedure *— Appeal — Discretion exercised by appellate court — Sufficient evidence before court to assess entitlements under contract — Retrial by trial court would cause undue delay — Whether appellate court ought to perform duties of trial court in assessment — Whether case ought to be remitted back to trial*

Contract *— Terms — Calculation of entitlements under a joint venture agreement*

Sri Alam ('the appellant') and Newacres ('the respondent') were joint venturers in a housing estate, consisting of a variety of commercial and residential units. The parties executed a joint venture agreement ('the agreement'), in which the respondent forwarded RM7.5m to the appellant and the appellant surrendered the land to the respondent. The agreement allocated to the appellant certain buildings in accordance with cll 5 and 22 of the agreement, with the respondent retaining the balance of the plots to be subdivided.

The parties disagreed as to the implementation of the agreement, and further problems arose when the respondent proceeded to change the 1979 layout plan of the development to the appellant's detriment. A civil suit was filed on 3 January 1985 against the respondent praying for a number of reliefs arising from the execution of the agreement.

Subsequently, the trial commenced before the trial judge on 21 October 1991. The appellant's claim was dismissed with costs. The appellant appealed against the dismissal of its claim and the judgment on the counterclaim to the (then) Supreme Court. On 9 December 1993, the Supreme Court allowed the appellant's appeal and found the respondent liable for breach of its fiduciary duties to the appellant. The counterclaim was dismissed. Additionally, the court ordered the case back to be sent back to trial to 'determine the extent of the fiduciary duties and breach thereof', and to assess entitlement ('the Supreme Court order'), thus containing a contradiction in terms.

At the new trial in the High Court, the trial judge ignored that part of the order which found the respondent liable to the appellant on the grounds of breach of fiduciary duty and the judge thus proceeded to determine whether a fiduciary relationship existed, and whether there was a breach. The trial judge ruled that there was no

fiduciary relationship and dismissed the appellant's claims as they were contractual in nature and the appellant had failed to plead them as such. He also dismissed the respondent's defence of set-off, stating that the appellant had to first specifically claim in its re-amended statement of claim for the money collected by the respondent for the bungalow lots presold before the joint venture agreement was entered into before the defence could be used.

The appellant appealed against the whole of the trial judge's decision stating that the judge had erred in construing the order, arguing that the main purpose of the order was the test to be used when interpreting the order, and that the main purpose of the order was the judgment that the respondent was liable to the appellant for breach of fiduciary duty. The appellant further argued that the trial judge erred by not assessing the appellant's entitlements based on the provisions of cll 5 and 22 of the agreement by reason that it was not pleaded in contract.

The respondent appealed against only part of the trial judge's decision, the major issue being the disallowed defence of set-off. The respondent further supported the trial judge's construction of the order, stating the proper interpretation should follow that of a statute, and that the appellant had to plead in contract in order for the entitlements under the agreement to come into scrutiny. The respondent argued against the applicability of the penalty found in cl 21 of the joint venture agreement by reason that the failure to complete the project within the stipulated time period had accrued after proceedings had commenced, and hence its inclusion in the re-amended statement of claim introduced a new cause of action.

Held, allowing the appeal, and dismissing the cross-appeal:

(1) The trial judge misconstrued the Supreme Court order when faced with the inconsistency between the first and second parts of the order. When interpreting a court order, the main purpose of the order must be ascertained, which in this case was a finding of the respondent's breach of fiduciary duty to the appellant. The Supreme Court, in reversing the lower court's decision must have been so convinced by the appellant that in addition to contractual duties, fiduciary duties existed and were breached by the respondent that it made a positive order stating such and ordered a trial to assess damages arising out of the breach. However, in adopting a purposive approach to the order, the trial judge had preferred the later part of the order to the earlier one. This was where he had erred, for had he identified what the main purpose of the Supreme Court order was, he would have ignored the later direction and proceeded to identify the extent of the appellant's entitlements under the agreement, if any, and to assess the same. This was not done but instead the trial judge had tried the case all over again by proceeding to consider the nature of the relationship between the parties and determining

whether such a relationship imposed on the respondent duties of a fiduciary character. This was quite unnecessary as those matters had already become non-issues by virtue of the Supreme Court order. The trial judge should have instead ignored the second part of the order and proceeded to identify the appellant's entitlement under the agreement and assess the same (see pp 311A–E, H–I and 312A); *Forbes v Git & Ors* [1922] 1 AC 256, *Glynn & Ors v Margetson & Co & Ors* [1893] AC 351 and *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 followed.

(2) An appellate court has the discretion to perform the duties of the trial court in cases where there is sufficient evidence before it to perform the necessary duties and also when there are concerns that referral back to trial will cause undue delay in the final disposal of the case. In this case, it had been over ten years since the action was first filed and hence the case should not be remitted back to trial to calculate the appellant's entitlements, as this would cause further delay. Instead, the Court of Appeal should itself ascertain the appellant's entitlements under the joint venture agreement (see p 312C–E).

(3) The trial judge erred by denying the appellant its entitlement under cll 5 and 22 of the joint venture agreement based on the reasoning that the appellant had failed to frame his claims in terms of contract. By virtue of the respondent's breach of fiduciary duty arising out of the joint venture, it was necessary to examine the various and relevant clauses of the agreement that make provisions for the appellant's entitlements to determine the scope of such entitlements. In so doing, the nature of the appellant's cause of action was not altered, since determining and assessing the entitlements was not the cause of action but merely an exercise of awarding the profits that were due to the appellant, this being the natural consequence of the loss suffered by the appellant as a result of the respondent's breaches of its fiduciary duties (see p 312G–H).

[Bahasa Malaysia summary

Sri Alam ('perayu') dan Newacres ('penentang') adalah pengusaha bersama dalam sebuah estet perumahan, yang terdiri daripada pelbagai jenis unit perdagangan dan kediaman. Pihak-pihak telah mengikat suatu perjanjian usahasama ('perjanjian tersebut'), dalam mana penentang telah membayar RM7.5 juta kepda perayu dan perayu menyerahkan tanah kepada penentang. Perjanjian tersebut menguntukkan kepada perayu bangunan tertentu menurut fasal 5 dan 22 perjanjian tersebut, dan penentang mengekalkan baki plot-plot yang akan dipecah-bahagi.

Pihak-pihak telah bercanggah atas pelaksanaan perjanjian tersebut, dan masalah lanjut timbul apabila penentang terus menukar pelan susun atur tahun 1979 berhubung dengan pemajuan yang

memudaratkan perayu. Suatu guaman sivil difailkan pada 3 Januari 1985 terhadap penentang yang meminta beberapa relief yang timbul daripada pelaksanaan perjanjian tersebut. A

Berikutnya, perbicaraan telah bermula di hadapan hakim pada 21 Oktober 1991. Tuntutan perayu telah ditolak dengan kos. Perayu membuat rayuan terhadap penolakan tuntutannya dan penghakiman atas tuntutan balas kepada Mahkamah Agung (pada masa itu). Pada 9 Disember 1993, Mahkamah Agung membenarkan rayuan perayu dan mendapati bahawa penentang bertanggungjawab atas kemungkiran kewajipan fidusiari kepada perayu. Tuntutan balas ditolak. Tambahan pula, mahkamah memerintah supaya kes dibicarakan semula bagi 'menentukan takat kewajipan fidusiari dan kemungkirannya' dan untuk menaksir hak ('perintah Mahkamah Agung'), justeru itu mengandungi suatu percanggahan dalam terma. B C

Di perbicaraan baru di Mahkamah Tinggi, hakim perbicaraan tidak mengendahkan bahagian perintah yang mendapati penentang bertanggungjawab kepada perayu atas alasan kemungkiran kewajipan fidusiari dan hakim telah terus menentukan sama ada suatu perhubungan fidusiari wujud, dan sama ada terdapat kemungkiran. Hakim perbicaraan memerintah bahawa tiadanya kemungkiran dan menolak tuntutan perayu oleh kerana mereka adalah bersifat kontraktual dan perayu telah gagal berhujah demikian. Beliau juga menolak pembelaan tolakan penentang, dan menyatakan bahawa perayu terpaksa menuntut wang yang dikumpul oleh penentang secara spesifik dalam pernyataan tuntutan yang dipinda untuk lot rumah banglo yang telah dijual sebelum perjanjian usahasama diikat sebelum pembelaan itu boleh digunakan. D E

Perayu membuat rayuan terhadap semua keputusan hakim perbicaraan dan menyatakan bahawa hakim telah melakukan kesilapan dalam mentafsir perintah, berhujah bahawa tujuan utama perintah itu adalah untuk ujian yang patut digunakan ketika mentafsir perintah itu, dan bahawa penentang bertanggungjawab kepada perayu atas kemungkiran kewajipan fidusiari. Perayu selanjutnya berhujah bahawa hakim perbicaraan adalah salah kerana tidak menaksir hak perayu berdasarkan peruntukan fasal 5 dan 22 perjanjian tersebut atas alasan ianya tidak dibentangkan dalam kontrak. F G

Perayu hanya membuat rayuan terhadap sebahagian daripada keputusan hakim perbicaraan, isu utamanya merupakan pembelaan tolakan yang tidak dibenarkan. Penentang selanjutnya menyokong tafsiran hakim atas perintah itu, dan menyatakan tafsiran yang betul harus mengikut tafsiran statut, dan bahawa perayu harus merayu dalam kontrak bagi membolehkan hak di bawah perjanjian tersebut diperiksa. Penentang berhujah terhadap pemakaian penalti yang didapati dalam fasal 21 perjanjian usahasama atas alasan kegagalan menyempurnakan projek dalam jangkamasa yang disyaratkan terakru selepas prosiding telah bermula, dan maka kemasukannya dalam pernyataan tuntutan yang dipinda telah memperkenalkan suatu kausa tindakan yang baru. H I

Diputuskan, membenarkan rayuan dan menolak rayuan balas:

(1) Hakim perbicaraan salah tafsir perintah Mahkamah Agung apabila dihadapi dengan bahagian pertama dan kedua perintah itu yang tidak konsisten. Ketika mentafsir suatu perintah mahkamah, tujuan utama perintah itu mestilah dipastikan, yang mana dalam kes ini adalah suatu pendapat atas kemungkiran kewajipan fidusiari penentang kepada perayu. Dalam mengakas keputusan mahkamah rendah, Mahkamah Agung mestilah sebegitu terpengaruh oleh perayu bahawa sebagai tambahan kepada kewajipan kontraktual, kewajipan fidusiari wujud dan telah dimungkir oleh penentang lalu ia membuat perintah positif yang menyatakan demikian dan memerintahkan perbicaraan bagi menaksir ganti rugi yang timbul akibat kemungkiran itu. Walau bagaimanapun, dalam menerima-pakai pendekatan 'purposive' kepada perintah itu, hakim perbicaraan memilih bahagian kemudian perintah berbanding dengan bahagian yang lebih awal. Di sinilah beliau tersilap, kerana jika beliau telah mengenal pasti tujuan utama perintah Mahkamah Agung dari awal, beliau mungkin mengabaikan arahan pada kemudiannya dan terus mengenal pasti takat hak perayu di bawah perjanjian tersebut, jika ada, dan menilai yang sama. Ini tidak dilakukan tetapi sebaliknya hakim perbicaraan telah membicarakan kes semula dengan terus mempertimbangkan jenis perhubungan di antara pihak-pihak dan menentukan sama ada perhubungan demikian mengenakan kewajipan yang bersifat fidusiari ke atas penentang. Ini tidak perlu oleh kerana perkara tersebut tidak menjadi isu akibat perintah Mahkamah Agung. Hakim perbicaraan seharusnya tidak mengendahkan bahagian kedua perintah itu dan terus mengenal pasti hak perayu di bawah perjanjian tersebut dan membuat taksiran atasnya (lihat ms 311A–E, H–I dan 312A); *Forbes v Git & Ors* [1922] 1 AC 256, *Glynn & Ors v Margetson & Co & Ors* [1893] AC 351 dan *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 diikut.

(2) Sesebuah mahkamah rayuan mempunyai budi bicara untuk melaksanakan tugas mahkamah perbicaraan dalam kes di mana terdapat keterangan yang mencukupi di hadapannya bagi melaksanakan tugas yang perlu dan juga apabila ada kekhuatiran bahawa rujukan semula kepada perbicaraan akan mengakibatkan kelewatan yang tak wajar dalam penyelesaian muktamad kes. Dalam kes ini, lebih 10 tahun telah berlalu sejak tindakan difailkan buat kali pertama dan oleh itu kes tidak patut diremit kepada perbicaraan untuk mengira hak perayu, oleh kerana ia akan menyebabkan kelewatan lanjut. Sebaliknya, Mahkamah Rayuan sendiri harus memastikan hak perayu di bawah perjanjian usahasama (lihat ms 312C–E).

(3) Hakim perbicaraan silap kerana beliau menafikan perayu haknya di bawah fasal 5 dan 22 perjanjian usahasama berdasarkan taakulan bahawa perayu telah gagal membuat tuntutannya dalam terma kontrak. Menerusi kemungkiran kewajipan fidusiari

penentang yang timbul daripada perjanjian usahasama, adalah perlu untuk memeriksa pelbagai fasal perjanjian yang relevan yang membuat peruntukan atas hak perayu bagi menentukan skop hak demikian. Dalam berbuat demikian, jenis kausa tindakan perayu tidak diubah, oleh kerana penentuan dan penilaian hak bukanlah kausa tindakan tetapi hanya pelaksanaan mengawardkan keuntungan yang patut dibayar kepada perayu, dan ini adalah kesan biasa atas kehilangan yang dialami oleh perayu akibat kemungkiran kewajipan fidusiari penentang (lihat ms 312G–H).]

Notes

For cases on judgments and orders, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2032–2065.
For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.
For cases on terms of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2196–2255.

Cases referred to

Eshelby v Federated European Bank Ltd [1932] 1 KB 254 (refd)
Forbes v Git & Ors [1922] 1 AC 256 (folld)
Glynn & Ors v Margetson & Co & Ors [1893] AC 351 (folld)
Lim Phin Kian v Kho Su Ming [1996] 1 MLJ 1 (folld)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (folld)
Sio Koon Lin & Anor v SB Mehra [1981] 1 MLJ 225 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 17, O 33 r 2

Appeal from: Originating Summons No C 189 of 1985 (High Court, Kuala Lumpur)

V Manoharan (*Joseph Yeo* with him) (*Wan Majid Mano & Nada*) for the appellant.
Md Ismail Md Shariff (*Jin Chong* and *Oomen Koshy* with him) (*Mohamed Ismail & Co*) for the respondent.

Cur Adv Vult

3 July 1996

Shaik Daud JCA: I have had the advantage of reading in draft the judgments of both Siti Norma Yaakob and Abdul Malek Ahmad JJCA and I completely agree with both the findings. I have nothing to add but would like to echo the sentiments expressed by Abdul Malek Ahmad JCA that it

A is indeed disheartening to note that the litigation had dragged on for far too long and while the parties are locking horns in the courts, the area in question had been plaqued by severe flooding which had caused untold misery to the residents therein not to mention the thounsands of ringgit loss to them.

B I would also allow this appeal and adopt all the conclusions concerning the calculations on the claims. The appeal is allowed with costs here and the court below and the deposit is to be refunded to the appellant.

3 July 1996

C **Siti Norma Yaakob JCA**: The litigation leading to this appeal has a long and chequered history. It started off with Sri Alam Sdn Bhd — the appellant before us — filing Civil Suit No 30 of 1985 against Newacres Sdn Bhd, the respondent and four others on 3 January 1985 praying for a number of reliefs arising from the execution of a joint venture agreement dated 2 October 1980 by the appellant with the respondent. On
D 21 January 1985, Abdul Razak J recorded a consent order staying the civil suit upon certain terms, one of which required the appellant to apply for a proper construction and interpretation of the joint venture agreement as to the respective entitlements of the parties thereunder with liberty to the appellant to lead evidence as to the existence or otherwise of a collateral
E contract without prejudice to the respondent.

Pursuant to the consent order, the appellant filed Originating Summons No C 189/85 on 2 October 1985 against the respondent seeking, inter alia, the following reliefs:

(1) a declaration that upon a proper construction of the joint venture
F agreement read together with the antecedent collateral agreement thereto, the appellant is entitled to a sum not less than RM226,336,730.59 less all sums received by the appellant from the respondent as at the date of the order to be made in the originating summons;

G (2) alternatively, an order that the respondent pay all monies or convey all lands and buildings that are due to the appellant upon a proper construction of the joint venture agreement read together with the collateral agreement antecedent thereto; and

(3) alternatively, an order that the court declares the entitlement of the
H appellant under the joint venture agreement read together with the collateral agreement antecedent thereto.

On 16 January 1986, the respondent applied to strike out the appellant's originating summons but nothing came out of this application as the parties consented that the appellant file a list of relevant issues to be
I determined by the court. This was done by two affidavits identifying 18 relevant issues and this prompted an exchange of affidavits and resulted in there being 11 affidavits filed by both parties containing replies and counter replies.

On 17 November 1986, Abdul Razak J decided that the dispute related to facts that were seriously disputed and directed the parties to exchange pleadings. On 11 March 1987, the learned judge also directed the appellant to file a statement of claim and the respondent to file a statement of defence and counterclaim. It would appear that the learned judge converted the originating summons into a writ action.

Pursuant to the directions given by Abdul Razak J, the appellant filed a statement of claim on 24 March 1987, and the respondent filed a statement of defence, set-off and counterclaim on 6 April 1987. A reply and defence to the counterclaim was filed by the appellant on 9 April 1987.

On 19 June 1987, the suit was ordered to be set down for trial within 30 days of that date upon a summons for directions taken by the appellant. Although various dates of hearing were fixed after that, the suit was never tried until 21 October 1991 and in the interim period various applications were made by both parties and these include the following:

(1) an application to amend the statement of claim was made on 2 December 1988 and allowed on 27 March 1989 and the appellant filed its amended statement of claim on 30 March 1989;

(2) two separate applications, one to strike out the appellant's statement of claim and the other to amend its statement of defence were filed by the respondent on 2 March 1989. On 16 March 1989, the application to strike out was dismissed with costs and on 27 March 1989 the application to amend was allowed in part. The respondent filed its amended statement of defence, set-off and amended counterclaim on 24 April 1989. This was followed by the filing on 11 May 1989 of the appellant's amended reply and amended defence to set-off and amended counterclaim;

(3) In 1990, the respondent filed two separate applications, one to add a third party, which was dismissed on 27 August 1990, and the other for better and further particulars of the appellant's pleadings which was also dismissed on 4 September 1990.

Finally, new dates of hearing were fixed for hearing in November 1990 but on the first day of hearing on 26 November, the respondent raised two preliminary objections based on the following grounds:

(1) that the appellant was suing for payment of money under a contract which was still being performed; and

(2) that the appellant had not referred the dispute between them to arbitration pursuant to cl 23 of the joint venture agreement.

Anuar J (as he then was) dismissed the respondent's preliminary objections on 21 March 1991 and the respondent appealed to the (then) Supreme Court in Civil Appeal No 02–117–91. On 18 October 1991, the Supreme Court dismissed the respondent's appeal with costs on the ground that as

joint venturers, the parties were governed by a fiduciary relationship, the extent of which was in issue and which can only be determined by extrinsic evidence and as such ought to be tried at the trial proper and cannot be decided by recourse to O 33 r 2 read together with O 18 r 11 of the Rules of the High Court 1980 ('the RHC'). As for the failure to refer the dispute to arbitration, the Supreme Court held that since the respondent had taken various steps in the proceedings and even agreed to the case to be set down for trial, there is no merit for the application to strike out based on the appellant's omission to refer. The judgment of the Supreme Court is reported in [1991] 3 MLJ 474.

The trial commenced before Anuar J (as he then was) on 21 October 1991 and after a hearing that stretched for 33 days, the learned judge dismissed the appellant's claim with costs on the ground that there was no fiduciary relationship existing between the parties and that the action should be based on a breach of contract. The learned judge also entered judgment for the respondent on the counterclaim in the sum of RM29,880,000 with costs as compensation for the loss of not being able to retain 100 units of bungalow lots pre-sold by the appellant before the parties entered into the joint venture agreement.

The appellant appealed against the dismissal of its claim and the judgment on the counterclaim and the Supreme Court in Civil Appeal No 02–368–92 allowed the appeal on 9 December 1993, entered judgment in terms of prayer (1) of the amended statement of claim, remitted the case to be heard by another judge on the issue of the nature and extent of the fiduciary duties breached by the respondent and ordered the assessment of moneys, if any, due to the appellant subject to the defence of any set-off.

The trial before NH Chan J (as he then was) commenced on 14 January 1994 pursuant to the Supreme Court order and it is not disputed that it was a continuation of the trial that was held earlier before Anuar J (as he then was). The second trial proceeded for 38 days and in the midst of which the amended statement of claim was allowed to be amended further on 11 April 1994 with the addition of para 20 and the respondent also filed a further re-amended statement of defence, set-off and amended counterclaim and replied by the appellant by its re-amended reply and re-amended defence to set-off and amended counterclaim.

NH Chan JCA dismissed the suit with costs on 20 September 1995 on the ground that although a fiduciary relationship exists between the parties, there has been no breach of it by the respondent. The trial judge also ruled that since the appellant did not specifically claim in its re-amended statement of claim for the money collected by the respondent for the bungalow lots pre-sold before the joint venture agreement was entered into, the defence of set-off was not available to the respondent. It is to appeal against these findings that the parties are now before us. In the case of the appellant, it is to express its dissatisfaction with the whole decision of the trial judge with the respondent seeking to vary that part of the decision:

(1) that determined the extension of time for the delivery of one of the appellant's entitlements, this being the 56 semi-detached houses under cl 5(a) of the agreement; and A

(2) that disallowed the defence of set-off.

The appellant specified 12 grounds in its memorandum attacking the decision of the trial judge and the respondent specified two grounds, and B to appreciate the various issues raised and for a better understanding of the dispute between the parties, we need to state the factual matrix of the case.

Land held under Certificate of Title No 19542 for Lot 82 situated in the Mukim and District of Klang comprising an area of approximately 584 acres ('the land') was purchased by the appellant in 1975 for about C RM6m for the purpose of developing it into a housing estate comprising of residential and commercial buildings. Part of the purchase price was financed through a loan of RM1.5m granted by Asiavest Merchant Bankers Bhd and the land was charged as security. Even though the appellant had no housing developer's licence to develop the land, it started selling D unsubdivided lots in 1975 to about 2,100 purchasers with the undertaking to construct residential and other buildings on the lots sold.

The appellant ran into difficulties when it could not fulfill its obligation to build the houses on the lots sold. It was not able to pay the conversion fee for the land even though conversion of the land had been approved in November 1979. The loan to Asiavest became overdue and the Bank E threatened to foreclose the land. Added to this was the fact that the 2,100 purchasers were demanding the return of their deposits and other payments made to the appellant as they felt that they had been cheated by the appellant as there was no construction on the lots they had purchased, and the Ministry of Housing and Local Government had threatened to take F action against the appellant if matters were not sorted out.

Faced with such insurmountable problems, the appellant was anxious to sell the land or find a financier to rescue its ambitious plans. After much difficulty, the rescuer came in the person of the respondent, a housing developer who then executed the joint venture agreement dated 2 October G 1980 with the appellant whereby in consideration of the respondent advancing RM7.5m for the land, the appellant transferred and surrendered the land to the respondent, allowed the respondent at the latter's sole costs and expenses to develop the land by the construction of residential, commercial and other buildings together with all the necessary infrastructure and amenities and subject to the appellant being allocated certain specific H buildings in accordance with cll 5 and 22 of the agreement with the respondent retaining the balance of the plots to be subdivided from the land.

It was pursuant to these arrangements that the respondent developed the land into a housing and commercial estate known as Taman Sri Muda I and to this day, construction of the various buildings is still continuing.

Both in the pleadings and before us, Mr Manoharan learned counsel for the appellant has stressed that the dispute between his client and the

respondent relates to the implementation of the joint venture agreement by the respondent. We consider the appellant's cause of action to be already settled, firstly, by the order of the Supreme Court dated 9 December 1993 which decided that quite apart from the contractual obligations arising from the joint venture agreement itself, the relationship of the parties is also governed by fiduciary obligations. Secondly, the respondent has also conceded to this and, based on this concession, the appellant then proceeded to argue on whether such fiduciary obligations or duties have been breached by the respondent. In reply and despite his admission, Encik Mohd Ismail, counsel for the respondent took issue with the appellant's first ground of appeal which concerns the non-compliance by the trial judge of the Supreme Court order dated 9 December 1993. As the proper and correct interpretation of the order is being questioned before us, it is only right and proper that we make a finding on this preliminary issue before dealing with the other substantive matters.

We begin by reproducing that part of the order as is relevant:

> IT IS ORDERED that this appeal be allowed and the order of the trial judge reversed and set aside AND IT IS FURTHER ORDERED that judgment be entered for the appellant on the issue of liability as claimed in prayer (1) of the amended statement of claim AND IT IS FURTHER ORDERED that this case be remitted for trial for assessment before another High Court judge to determine the extent of the fiduciary duties and the breach thereof and to assess what sum of money or other entitlement, if any, the appellant is entitled to receive and any consequential relief thereunder AND IT IS FURTHER ORDERED that the appeal against the counterclaim be allowed and the High Court is to determine any set off ... .

Prayer (1) of the appellant's amended or re-amended statement of claim seeks a declaration that the respondent has acted in breach of its fiduciary duties. Thus by its order dated 9 December 1993, the Supreme Court had declared the respondent to be liable to the appellant following the former's breach of its fiduciary duties to the latter. However, this declaration runs contrary to the other part of the order directing a retrial of the case before another High Court judge and specifying the function of the retrial judge to be 'to determine the extent of the fiduciary duties and the breach thereof'. The contradiction here is that, since there is already a judgment entered on the issue of liability against the respondent — which must mean that the respondent had breached the fiduciary duties it owed the appellant — why was there the necessity to determine the extent of the fiduciary duties and whether the respondent has breached such fiduciary duties all over again?

Faced with the contradiction, the trial judge adopted a purposive construction of the order and ruled that the later part of the order prevails over the earlier one as the learned judge found the earlier one to be unnecessary, thus leaving him with the task of determining the nature of the relationship of the parties, whether such relationship is fiduciary in nature and if so, whether it has been breached by the respondent. What is now in issue before us is whether the purposive approach of construing the

order as adopted by the trial judge correctly represents the intention of the Supreme Court when it made the order as it did. The appellant contended that it does not whilst the respondent maintained it does. A

The appellant relied on the two Privy Council cases of *Forbes v Git & Ors* [1922] 1 AC 256 and *Glynn & Ors v Mergetson & Co & Ors* [1893] AC 351 to support its contention that in construing a document one must reject words which are inconsistent with what one assumes to be the main purpose of the document. In the first case which originated in Canada, the Privy Council was asked to interpret a building contract that contained two clauses which appear to be repugnant and inconsistent with each other. The first clause provided that for a consideration of $3,000, the appellant, a building contractor, agreed to provide the materials and labour for altering a restaurant belonging to the respondents. The second clause contained provisions that the respondents were to pay the appellant the value of the materials provided and labour done, each at 12½% over costs irrespective of whether such value exceeded or was less than the contract price of $3,000. The materials and labour exceeded that sum and the appellant sued for the balance sum of $3,830.36 being the difference between a sum of $7,010.36 due under the contract and the sum of $3,180 which had been paid to him on account. B C D

The trial judge held that the second clause was repugnant and inconsistent with the first clause and was to be rejected and gave judgment on the basis of the contract price of $3,000 together with the value of additional works which he identified. The Supreme Court of Ontario reversed this judgment holding that the two clauses were to be read together and effect was to be given to the second clause. On appeal, the Supreme Court of Canada reversed the judgment of the Supreme Court of Ontario and restored the judgment of the trial judge. On appeal further to the Privy Council, it was held that 'if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be regarded as repugnant and the earlier clause prevails'. As the two clauses could not be reconciled, the earlier provision in the contract prevailed over the later provision. E F G

In *Glynn & Ors v Margetson & Co & Ors*, an English case, the question raised in the appeal was the construction to be put upon a bill of lading, which contained a deviation clause that was relied upon by the appellants when they were sued under the contract. They had agreed to carry oranges for the respondents from Malaga to Liverpool. The deviation clause gave the appellants the liberty to proceed and stay at any port or ports in any station in the Mediterranean and other identified places for the purpose of delivering cargo or passengers or for any other purpose whatsoever. The oranges were shipped on board the 'Zena' but instead of proceeding to Liverpool directly, the ship went off course to a port in the opposite direction, took in more cargo and retraced her course to Liverpool, thereby taking a longer time to reach Liverpool than if she had proceeded directly to Liverpool. Owing to the delay, the oranges arrived in Liverpool in a damaged condition. As consignees, the respondents sued the appellants H I

for breach of contract and the defence raised by the appellants was that the deviation was justified by the bill of lading.

The court at first instance held the deviation to be unjustified and gave judgment to the respondents, a decision that was affirmed by the Court of Appeal. On appeal, the Privy Council held that in construing an instrument of this sort, the paramount consideration is to ascertain the manifest object and intention of the contract. Since it is to take on board at one port and deliver at another port a perishable cargo, to hold that it was entered into with a power to the shipowner to proceed anywhere as he pleased, to trade in any manner as he pleased and to arrive at the port at which the oranges were to be delivered when he pleased, would defeat the very object and intention of such a contract. On that finding, the Privy Council dismissed the appeal.

Whilst agreeing with the principles of law enunciated in the two Privy Council cases, the respondent however argued that such pronouncements are only relevant where the inconsistency sought to be overcome exists in written instruments like deeds and agreements and where such inconsistency had been created quite unconsciously by the parties themselves. It was a building contract in the Canadian case and a bill of lading in the English case.

In the instant case before us, the inconsistency appears in an order of court and, to that end, not the doing of the parties themselves and considering the nature of the instrument to be interpreted, the respondent argued that the appropriate interpretation to be given to it shall be that given to a statute as was done by the Federal Court in the case of *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1. In that case, the construction of the amendments to the Courts of Judicature Act 1964 which were enacted in 1995 but given retrospective effect from 24 June 1994 came to be questioned and the issue was whether an appeal that was filed and served on 24 June 1994 (before the amendments were gazetted) and pending before the renamed Federal Court should instead be heard by the newly created Court of Appeal that was also established on 24 June 1994. The Federal Court adopted a purposive approach to the amendments which is that Parliament intended that so long as there is a judgment, order or decision of the High Court given on or before 23 June 1994 and an appeal against the same has been brought whether on or before or even after 23 June 1994, it is the Federal Court and not the Court of Appeal which is invested with the jurisdiction to hear and determine the appeal. To give a strict compliance to the amendments and state otherwise would have caused great inconvenience and a manifest injustice to the appellant.

We are mindful of the fact that all the three authorities concerned the interpretations of three different documents but a close perusal of the same authorities disclose one common factor and it is this. When trying to reconcile a document that contains words or clauses that are inconsistent or repugnant to each other, the primary consideration is to ascertain the manifest object and intention why such a document came into existence in the first place. Once such a purpose or intention has been ascertained,

words or clauses which are inconsistent with such a purpose or intention are excluded. Thus, in *Forbes'* case since the intention of the building contract was to reimburse and compensate the contractor for materials supplied and work done, the Privy Council held that he was to be so compensated on the lump sum payment of $3,000 as agreed thereby excluding another clause that states that should the value of the services rendered by the contractor exceed or fall below the contract price, the contractor was to be paid 12½% over his actual costs for each service rendered.

Likewise, *Glynn*'s case was decided on the basis that since the purpose and intention of the bill of lading was to deliver oranges from Malaga to Liverpool in good condition, the ship owners could not rely on the deviation clause to escape liability when sued under the contract.

Thus, the purposive approach as was adopted by the Federal Court in *Lim Phin Kian*'s case was the same approach adopted by the Privy Council in the two cases cited above although in the latter cases there was no reference made to it by name and to that end the nature of the documents sought to be interpreted and reconciled is not the deciding factor and that the same considerations of law are applicable to all written instruments of whatever nature and origin.

Having stated thus, we now ask ourselves what was the main purpose and intention of the Supreme Court order. Unfortunately, we do not have the benefit of a written judgment from the Supreme Court to guide us. As such, we have to look at all the surrounding circumstances. To begin with, it must be remembered that the Supreme Court was dealing with an appeal against the decision of Anuar J (as he then was), who, inter alia, had made the following findings when dismissing the appellant's claim with costs:

(1) There was no evidence to support the existence of a fiduciary relationship between the parties and as such there is no question of the respondent acting in breach of any fiduciary duty. On the contrary, the evidence tends to show a breach of contract claim.

(2) He had rejected the respondent's contention that the joint venture agreement is a sale and purchase agreement and held the agreement to be what it is styled to be, ie a joint venture agreement.

(3) There was no inducement or representation practised on the appellant that led to the execution of the joint venture agreement. As such, there is no warranty to the agreement as alleged by the appellant.

(4) No partnership was intended or created by the joint venture agreement. The parties derived only contractual rights under the agreement which do not give rise to fiduciary duties.

As for the respondent's counterclaim to be compensated for the loss of the bungalow lots that were pre-sold by the appellant before the execution of the joint venture agreement, since the claim was not seriously challenged by the appellant, judgment was entered for the respondent in the sum of RM29,880,000 with costs based on a formula accepted by both parties.

A Hence, before the Supreme Court, the appellant had to convince the court that it had, in addition to the contractual obligations created by the joint venture agreement, also an independent cause of action against the respondent based on the existence of fiduciary obligations created from dealings between the parties arising from the agreement and which had been breached by the respondent. In other words, to succeed on its claim B that the respondent had breached the fiduciary duties it owed the appellant, the latter must establish the former's liability for such a breach or breaches. The Supreme Court must have been so convinced as by its order it had:

(1) allowed the appeal and reversed the order of the trial judge;

C (2) entered judgment for the appellant on the issue of liability as claimed for in prayer (1) of the amended statement of claim;

(3) remitted the case for trial for assessment before another High Court judge to determine the extent of the fiduciary duties and any breach thereof;

D (4) ordered the assessment of money, if any, that the appellant is entitled to receive and any consequential relief;

(5) allowed the appeal against the counterclaim; and

(6) ordered that the judge hearing the retrial to determine any set-off.

By allowing the appellant's appeal and reversing the order of the first trial E judge, the Supreme Court had clearly shown that it had disagreed with the finding of the trial judge that there is no cause of action based on the respondent's breach of its fiduciary duties to the appellant. It was based on such a positive finding that the Supreme Court proceeded to enter judgment for the appellant on the issue of liability by declaring that the respondent F had breached its fiduciary duties as pleaded by the appellant. It could only have done so based on the evidence adduced at the trial and that all allegations of breaches of fiduciary duties that have been particularized at paras 13, 15, 16 and 19 of the re-amended statement of claim have been proven against the respondent.

As the appellant's claim stands or fails on the issue of liability, it is G our considered opinion that the main purpose of the Supreme Court order was to establish the issue of liability if any, and having found so, made the other consequential orders and directions as listed at paras (3)–(6) above. However, in so doing, it has also included the direction that the High Court 'determine the extent of the fiduciary duties and any breach thereof'. H In adopting a purposive approach to the order, the trial judge had however preferred the later part of the order than the earlier one. This we consider is where he had erred, for had he identified what was the main purpose of the Supreme Court order, he would have ignored the later direction and proceed to identify the extent of the appellant's entitlements under the agreement, if any, and to assess the same. This was not done but instead I the trial judge had tried the case all over again by proceedings to consider the nature of the relationship between the parties and determining whether such a relationship imposed on the respondent duties of a fiduciary

character. This, we consider, was quite unnecessary as we had already pointed out those matters have already become non-issues by virtue of the Supreme Court order. As such, we consider that the trial judge's conclusions that 'the agreement is a straight forward commercial transaction between a housing or property developer and the proprietor of land' and that the relationship of the parties 'does not exhibit the normal attributes of a partnership' or that 'the respondent is not a fiduciary as a partner in a partnership is a fiduciary towards his co-partners' to be unnecessary and redundant.

Having pointed out the errors of the trial judge and that liability has been established against the respondent, we shall now proceed to do what the trial judge should have done, ie comply with the remaining directions of the Supreme Court order by identifying the appellant's entitlements under the agreement and assessing the same. This, we wish to point out, is not the duty of an appellate court and we were minded at first to refer the whole matter back to the trial judge with a direction to assess the appellant's entitlements, if any, consequent upon the respondent's breaches of its fiduciary duties to the appellant. However, considering that proceedings in this suit had already stretched for more than 10 years and since the evidence of the appellant's entitlements are already before us, we have decided to perform the onerous task ourselves rather than allow the matter to drag further. This had of course resulted in the delay in the delivery of this judgment.

A perusal of the agreement shows such entitlements to be provided by cll 5, 22, 12(e) and 21.

However, before we proceed to consider the various entitlements, we need to clear up a number of objections taken by the respondent, the first of which relates to the true nature of the appellant's cause of action. Whilst the pleadings aver to breaches of fiduciary duties, the respondent questions that the reliefs sought by way of the entitlements claimed to be due under cll 5, 22, 12(e) and 21 of the agreement are contractual in nature.

We accept that situation to be in order for although the pleadings do not allude to a construction summons or a case of breach of contract, nonetheless, when it comes to assessing the entitlements due to the appellant, the various and relevant clauses of the agreement that make provisions for such entitlements have to be interpreted to determine the scope of such entitlements. In so doing, we have not altered the nature of the appellant's cause of action, as determining and assessing the entitlements is not the cause of action, but merely an exercise of awarding the profits that is due to the appellant, this being the natural consequence of the loss suffered by the appellant as a result of the respondent's breaches of the fiduciary duties it owed the appellant.

Another objection raised is that there is no proof of any breach of fiduciary duties by which the Supreme Court can determine liability.

A perusal of the appeal records shows that at the first trial, the appellant brought one witness, whose evidence is found at pp 3533–3714, vol 10 of the appeal records ('the AR'). The respondent produced three

witnesses in the persons of its development and co-ordination manager ('DW1'), its accountant ('DW2') and its architect ('DW3') and their evidence is found at pp 3717–3840, vol 10 of the AR. Together with the oral evidence, there is also the contemporaneous documents produced by both parties that make up the bulk of the AR. The trial ran for 33 days and with such abundance of evidence, there can be no denying the fact that the Supreme Court had before it all the evidence necessary to conclude that the respondent had breached its fiduciary duties to the appellant.

Returning to the entitlement, we begin with cl 5 of the agreement which is made up of six paragraphs and for ease of reference we shall take the provisions of each paragraph separately. We begin with cl 5(a), which is worded as follows:

> 5 (a) The company shall be allocated the following plots completely developed together with all the necessary infrastructure and amenities by the developer constructing at its sole cost and expenses the relevant residential, commercial or other buildings on such said plots:
>
> | Types of Plots | No of Plots |
> |---|---|
> | (1) Low costs houses | 1,105 |
> | (2) Single-storey terrace houses | 399 |
> | (3) Low cost flats | 264 |
> | (4) Petrol diosks | 2 |
> | (5) Shop houses | 79 |
> | (6) Double-storey terrace houses | 198 |
> | (7) Semi-detached houses | 56 |

It is not disputed that all the buildings listed in items 1–4 and 6 have been delivered to the appellant except for item 5 for which the appellant claims that four out of the 79 units of shop houses have yet to be delivered by the respondent and likewise the whole of the 56 units of semi-detached houses listed at item 7.

In the court below, the parties had agreed that the appellant's entitlement to all the 79 units of shop houses have been satisfied in full. Before us, the appellant admits that it has been mistakenly wrong as only 75 units have been delivered. There are still four more units of the four storey type to be delivered and the mistake was only realized after the appellant had made a proper account of its entitlement. It now claims delivery of the four units or the total amount of their sale value calculated at RM575,000 per unit.

In reply, the respondent maintains that the remaining four units had already been delivered to the appellant who then sold them to four purchasers in 1991 and 1992. Particulars of the four units, the names of the four purchasers and the dates of the four sale and purchase agreements executed in respect of each sale were tendered by the respondent.

There is no serious rebuttal to the respondent's contention and considering that there had been an earlier admission that all 79 units had been delivered, we are loathe to accede to the appellant's claim that it is

entitled to four more units. We disallow this claim for lack of supporting evidence.

It is not disputed that in the original layout plan that was approved in 1979, the respondent was to construct 166 semi-detached houses of which the appellant is entitled to 56 units under item 7 of cl 5(a). However, in 1983, the respondent amended the layout plan and in the process wiped out construction of such houses thereby depriving the appellant of its entitlement. However, the matter has now been put right by the respondent amending the layout plan further and making provision for the construction of 60 semi-detached houses of which 56 units will be delivered to the appellant once construction of such houses has been completed. Whilst waiting completion, the respondent however does not agree that the appellant can instead claim for the sale value of the 56 units which has been agreed between the parties at RM225,000 per unit. For this very reason, the appellant claims the amount of RM12.6m (RM225,000 x 56) as damages in lieu of the uncertainty in the completion and in the physical delivery of the 56 units.

The trial judge disallowed this entitlement, even though he found the 56 units to be trust property on the grounds that:

(1) it is contractual in nature;

(2) it has not been pleaded so;

(3) it has not accrued when proceedings were filed in 1985; and

(4) there is no evidence that the respondent had made a profit out of the 56 units which have yet to be delivered and as such, the respondent had not breached its duty as a fiduciary.

Following our finding of what the appellant's true cause of action is, we see no merits to grounds (1) and (2) and we adopt the same reasoning as and when the trial judge disallowed the appellant's other entitlements based on grounds (1) and (2).

On the issue as to the accrual of the cause of action for the 56 semi-detached houses, this must of necessity be in 1983 when the amended layout plan removed the construction of all semi-detached houses. Hence, in 1985 when the present proceedings were first initiated, the cause of action had already accrued to the appellant. The fact that the amended layout plan wiped out the construction of the semi-detached houses meant that there was a saving of the area earmarked for the construction of such houses and it is this saving which has benefitted the respondent for under cl 1 of the agreement the area reverts to the respondent to the detriment of the appellant. This is very much a case of one man's loss that benefitted another, a situation that cannot arise where their relationship is governed by fiduciary obligations.

Before us, what is in issue is not the appellant's entitlement to the 56 units as that has been acknowledged by the respondent, but the form in which the entitlement is to be enforced, ie by physical delivery as agreed to by the parties under cl 5(a) or in lieu thereof the total sale value of the 56 units. Physical delivery must necessarily mean that construction of the

A 56 units has been completed to make delivery possible, but in this case, apart from a general statement from the respondent that such houses are now under construction, there is no other evidence to show the stage of construction or when construction will be completed. Since the appellant's cause of action is for breaches of fiduciary duties, an equitable remedy, and not founded on breach of contract, we consider that the appellant had B been unjustly penalized by waiting for an indefinite period of time for the 56 units of semi-detached houses to be built and completed. It must also be remembered that it was the respondent who initiated the amendments to the layout plan in 1983 thereby depriving the appellant of its entitlement. In any event, the respondent will not be prejudiced by a money award as C it can resell the semi-detached houses once completed. On that reasoning, we consider that the appellant's entitlement to the 56 units of semi-detached houses is to be satisfied by the payment of the sale value of such units calculated on the basis of the agreed sale value per unit. For the 56 units, the appellant is therefore entitled to receive 56 x RM225,000 = RM12.6m from the respondent as damages as its entitlement under D cl 5(a).

We now turn to cl 5(b) of the joint venture agreement which reads as follows:

> The company shall be allocated all the bungalow plots as approved in the E layout plan as presently approved with all necessary infrastructure and amenities to be constructed at the sole cost and expense of the developer but without any buildings.

There is evidence both oral and documentary that under the 1979 layout plan as approved, there is provision for 149 bungalow plots measuring F 6,000 sq feet per plot and which shall be allotted to the appellant, who in turn would deliver the same plot to 149 purchasers as such plots had been sold by the appellant to the purchasers prior to the execution of the joint venture agreement. The respondent is aware of such arrangements but it allotted only 142 bungalow lots to the appellant as following amendments to the layout plan in 1983, the number of bungalow lots was reduced from G 149 to 142. As a result, the appellant's entitlement is reduced by seven lots and for this loss now claims compensation or reimbursement calculated on the formula of 6,000 sq feet (area of each lot) x RM24 (the 1994 market price per sq foot) x 7, which gives a total of RM1,008,000.

The only real reason given by the respondent for its refusal to H compensate the appellant is that the seven bungalow lots had been taken by Lembaga Letrik Negara ('LLN') for the purpose of erecting a main intake station and a government research station. As the matter was completely out of the respondent's control, it considers it liability to compensate has also ended.

I Against this, there is also the argument that what LLN wanted was only the area to build its stations. It did not specify the desired area where the stations were to be sited. The very fact that the stations are sited in the bungalow lots based on plans drawn by the respondent's own architect, raises the inference that the amendments done to the layout plan to

accommodate the LLN were not done bona fide and to the detriment of the appellant. The architect could just as easily have chosen an area where the appellant's entitlement will not be disturbed. It was to cover such a station that the parties had included the provisions of cl 22(a) into the agreement which states that any amendment done to the layout plan shall not effect the appellant's entitlement under cl 5.

As physical delivery of the seven bungalow lots is not possible, the appellant is entitled to be compensated on a formula which has not been disputed, namely 6,000 sq feet (area of each bungalow lot) x RM24 (1994 market price per sq foot) x 7 = RM1,008,000.

We now come to cl 5(c) of the agreement which states as follows:

> The company shall compensate the developer for the profits it had foregone by reason of it not having allowed to retain 100 units of the said bungalow plots and the purchase price received or receivable by the company in respect of the number of plots approved for semi-detached houses hereinbefore allotted to the company shall be utilized towards meeting such profits foregone. The profits foregone shall be determined by taking the difference between the selling or estimated selling price of the said semi-detached houses and the costs or estimated costs of constructing the same in accordance with their specifications and plans.

Paragraph (c) of cl 5 is to be read together with paras (a) and (b) of the same clause. Under para (b), the respondent is not entitled to any bungalow lot and it is to reimburse the respondent for this loss in profit that the appellant has agreed to compensate the respondent from funds representing the proceeds of sale of the semi-detached houses allotted under para (a) item 7. The loss of such profit which is the compensation to be paid to the respondent is to be calculated on the difference between the estimated selling price of the semi-detached houses and the estimated costs of constructing the same.

It is not disputed that the estimated selling price of each semi-detached house is RM225,000, whilst the cost of constructing it comes to RM70,000, thereby leaving a difference of RM155,000 between the two prices. The only issue raised is the multiplier to be adopted when assessing the compensation due to the respondent. The appellant contends it is 56, this being the number of semi-detached houses it is entitled to under para (a) item 7, whilst the respondent states it should be 166, the total number of semi-detached houses that was originally provided for in the 1979 layout plan.

The answer lies in the interpretation to be given to para (c) itself. That particular paragraph states the compensation is to come from the proceeds of sale 'in respect of the number of plots approved for semi-detached houses herein before *allotted to the company*'. Since 56 semi-detached houses have been allotted to the appellant under para (a) item 7, the multiplier cannot be any other figure but 56. Thus, on a multiplier of 56, the appellant is to compensate the respondent on the calculation of 56 x RM155,000 = RM8,680,000.

A The next issue is whether this amount can be set off but since this forms the subject matter of the cross-appeal, we shall deal with that later on in this judgment.

Giving credit to the appellant for the sale value of the 56 semi-detached houses under cl 5(a), and deducting the amount of compensation to be B made by the appellant to the respondent under cl 5(c), the net amount due to the appellant for the 56 semi-detached houses is now reduced to RM3,920,000, ie RM12,600,000–RM 8,680,000.

We next come to cl 5(d) which sets out three different entitlements as follows:

C The company shall also be entitled and be allocated the following:

(i) thirty-five percent (35%) of the cinema unit to be built by the developer at its own costs and expenses;

(ii) thirty-five percent (35%) of any extra shop-lots and thirty-three percent (33%) of any residential plots fully developed by the developer at its own cost and expense together with all necessary infrastructure and D amenities, such extra plots being available on the basis of the layout plan as presently approved after survey; and

(iii) all portions of the said land required for public use or purpose.

Until today, the cinema unit has not been constructed and as at 29 July 1985, the estimated market value of this building has been placed by the E respondent at RM3,080,000, the figure submitted by the respondent to the Inland Revenue Department for tax purposes. The appellant now claims 35% of its value, ie RM1,078,000.

The appellant's entitlement under cl 5(d)(ii) is in respect of extra units available under the 1979 layout plan. These include one unit of F supermarket and one unit of wet market which have yet to be built.

The appellant's 35% entitlement to these two extra units of commercial buildings have been calculated by the respondent to be RM3,916,000 for the supermarket and RM3,036,000 for the wet market. These figures were supplied by the respondent to the Inland Revenue G Department for the purpose of computing the estimated profits to be derived by the appellant from the Taman Sri Muda project.

There are two objections to the appellant's entitlements under cl 5(d)(i) and (ii). The first is that by virtue of a supplementary agreement made between the parties, the provisions of cl 5(d)(i) and (ii) have been H taken out of the joint venture agreement. The terms of that supplementary agreement are contained in a letter dated 24 January 1984 whereby the respondent had proposed the incorporation of a new company to develop and manage the cinema, the supermarket and the wet market. The appellant would be a shareholder of this new company to be incorporated, with a 35% equity and would also be entitled to a 35% share in the gross revenue I to be collected after letting out the three commercial buildings.

Those arrangements were agreed 12 years ago and to-date no new company has been incorporated and this may well explain why the three

commercial buildings have not been constructed yet. In any event, under cl 12(e) of the agreement the time period for completing all the appellant's allocations under the agreement has been agreed at eight years from the date of the agreement and this means that time for completion had expired in 1988. However, there is evidence that an extension of 63 months to complete was given by the architect under cl 21 of the agreement, but the period of extension is challenged by the appellant, for which more will be said later. Even taking the completion date to the disputed period of 63 months, construction of the three commercial buildings should have been completed by 1994 but since this is not the case and that cll 12(e) and 21 have not been taken out of the agreement, we consider that the proposals contained and accepted in the letter dated 24 January 1984 have also expired.

The other objection is that entitlement to the supermarket and wet market is subject to the layout plan being surveyed as required by cl 5(d)(ii). That clause however does not identify who should conduct the survey and before us each party is contending that the other should do so. Perhaps the answer lies in the agreement itself and in cl 12(c) the respondent gave an undertaking that it shall carry out all administrative functions relating to the project and since getting the layout out plan surveyed is very much an administrative act, the respondent cannot now rely on its omission to escape responsibility for refusing the appellant its entitlement under cl 5(d)(ii).

On a fair and just construction of cl 5(d)(i) and (ii), we allow the appellant's entitlements to the following based on the amounts assessed by the Internal Revenue Department to be the profits derived by the appellant on the three commercial buildings:

(1) RM1,078,000 being 35% of the value of the cinema unit under cl 5(d)(i);

(2) RM3,916,000 being 35% of the value of the supermarket under cl 5(d)(ii); and

(3) RM3,036,000 being 35% of the value of the wet market also under cl 5(d)(ii).

Coming to cl 5(d)(iii), the appellant contends that the rationale behind the appellant's entitlement to 'all portions of the said land required for public use or purpose' is that if such land earmarked for schools, playgrounds, community centres, surau, open space, etc is reduced or saved following any amendment done to the layout plan, then such reduction or saving must be returned to the appellant.

It is not disputed that when it amended the layout plan in 1983, the respondent reduced the area of the public utility land and in so doing it saved a large portion of the land and on which it eventually constructed luxury apartments. It is the appellant's contention that 25.94 acres of land was saved in this manner and in all good faith the respondent must return this saving to the appellant under cl 5(d)(iii).

A The respondent's reply to this is three fold:

(1) that cl 5(d)(iii) is invalid and unenforceable;

(2) that the amendments only saved 16.8 acres and not 25.94 acres as contended by the appellant; and

B (3) that the disputed balance of 9.14 acres is not public utility land.

In the court below, the trial judge disallowed this entitlement on the ground that there was no pleading for such a contractual claim.

The very fact that the trial judge recognized the entitlement to be contractual in nature is yet another instance of the failure to appreciate the C nature of the appellant's true claim which is for breach of fiduciary duties. In this instance, particulars of that breach are averred to in para 13(vi) of the re-amended statement of claim to be as follows:

> Placing a construction upon the terms of the joint venture agreement which to the knowledge of the defendant was wrong and thereby depriving the D plaintiff of its entitlement under the joint venture agreement.

Bearing this particular breach in mind, we turn to the respondent's specific objections.

We accept that the Land Office, Klang, when approving the conversion of the land, had imposed a condition that 11 categories of land use for the E public shall be deemed to have been surrendered to the state authority and as such no titles would be issued in respect of such lands. Evidence of that is clear from condition (vii) specified in the letter of approval dated 6 November 1979. It is the respondent's contention that since the parties cannot claim a right to any portion of the land required for public use or F purpose since such lands are not theirs to apportion, the appellant's entitlement under cl 5(d)(iii) is therefore unenforceable as being invalid. We, too, accept this contention but in this instance what is being claimed is not the public utility land which has been surrendered to the state authority but only the portion of land which has been saved through the amendments to the layout plan from being taken by the state authority as G public utility land. To that extent, reference to condition (vii) is not relevant. Before us, the respondent has conceded that if there has been a saving in the public utility land, the appellant is entitled to that saving.

The respondent concedes that only 16.8 acres of public utility land was saved and not 25.94 acres as contended by the appellant. Both parties H rely on the evidence of En Jalal bin Johari, PW1, a licensed land surveyor, engaged by the appellant in March 1995 to draw the pre-computation survey plan, based on the 1979 layout plan and to check the size of the public utility land. That pre-computation survey plan is P5, which is made up of:

I (1) two perimeter plans of the project compiled from the pre-computation plan prepared by another surveyor and from data obtained from the survey department;

(2) the index plan of the pre-computation plan of the project based on the 1979 layout plan; and

(3) the actual plan showing the area in blocks for development with each block compiled separately and which PW1 referred to as portion 1 to portion 14.

It is PW1's evidence that the disputed 9.14 acres is made up of:

(1) 4.73 acres of open space situated within the vicinity of 800 units of five storey low cost flats. It contains two tennis courts, a roller skating rink and and open space; and

(2) 4.41 acres of car park provided for the cinema, supermarket and wet market areas.

In respect of the 4.73 acres of open space, PW1 has admitted that there was no clear demarcation lines in the 1979 layout plan, D14, identifying the open space to be public utility land as was done, for example in the case of a football field that occupied another open space as seen from D14. Nevertheless he separated the open space from the low cost flats using the boundary line for the low cost flats as a guide, and he maintained that if he did not do so, the open space would become the common property of the flat dwellers and cannot be shared by the other residents of the project and therefore cannot form the basis of public utility land.

The appellant's justification for treating the open space as public utility land is founded on the following reasons:

(1) That the facilities provided in the open space, ie the tennis courts and skating rink are the more sophisticated types of facilities normally provided to residents of condominiums and luxury apartments and not to residents of low cost flats.

This we consider is not a conclusive reason for with an expected population of about 3,000 to 4,000 flat dwellers, there is a need for recreational expression and we consider that facilities like a tennis court and a skating rink to be nothing more than basic facilities.

(2) Being the only tennis courts and skating rink for the entire project and coupled with their location to a nearby football field give the general indication that such facilities are for the residents of the entire scheme and not confined to the flat dwellers only.

It is true that the only tennis courts and the skating rink are found in the open space. PW1 had also testified in the case of the football field located above the open space, there is a clear demarcation line identifying it as public utility land. The fact that all three facilities lie within the same vicinity does not necessarily single out the open space to be public utility land nor its description as children's playground/open space in D14 makes such an area to be public utility land.

Perhaps the most telling evidence is PW1's admission that his pre-computation of the open space as seen at p 4 of P5 does not tally with D14 and to that end he had amended the layout plan, which only the

A architect can do. Another factor to be borne in mind is that the low cost flats have been issued with a block title which includes the open space as well and when cross-examined on this, PW1 admitted that it was not right for him to exclude the open space from the block title and add it on to the public utility areas. In the light of this evidence, we cannot reconcile his B statement that if the open space is regarded as private property, this will decrease the overall area of land allotted for public use to less than 10%, the percentage required by the town planners. There is no evidence whether the percentage is only a guideline or a mandatory requirement under any specific law or regulation.

C In the light of PW1's biased evidence, we find no justification to uphold the appellant's contention that the 4.73 acres of open space lying within the low cost flats is public utility land.

We also make the same finding as regards the 4.41 acres of car park for the cinema, supermarket and wet market. This represents 61% of the entire commercial area of 7.14 acres. The basis on which PW1 separated D the car parks from the three commercial buildings is:

(1) that D14 is ambiguous as it describes the three commercial buildings to be provided with car parks; and

(2) that planning standard requires that there be one car parking lot for E every 500 to 1,000 square feet of commercial space.

PW1 had admitted there is no clear demarcation lines for the car parks for the three commercial buildings and we consider that this fact does not mean that D14 was ambiguous. On the contrary, it can also mean that each building was to have its own private car park. When cross examined F why he had separated the car parks from the commercial buildings that they are supposed to service, PW1 replied: 'I just provided for it'. Likewise he admitted that in 1979 there was no planning standard that required a special formula for the provision of car parks. In any event, the three commercial buildings have not been constructed yet and it is therefore premature to consider the extent of the car parks required for such buildings. G

To conclude, we find that on the evidence, only 16.8 acres of public utility land was saved when D14 was amended in 1983. We now have to consider whether the appellant is entitled to the 16.8 acres of land under cl 5(d)(iii) of the joint venture agreement or whether such entitlement can be sustained under cl 22. We will however revert to this when we come to H consider the various entitlements under cl 22.

We now come to the last entitlement in cl 5 which is framed as follows:

(e) It is hereby declared and understood by the parties hereto in the allocation of the plots and the said buildings under this clause the I following principles will apply:

(iii) that plots allocated to the company shall include thirty-five percent (35%) of the corner shop-lots and thirty-three percent (33%) of the corner residential houses of each type.

It is the appellant's contention that in the implementation of the agreement, the respondent failed to deliver corner lots of the shop houses and residential houses which fetch higher prices than the intermediate lots.

The respondent's reply to this entitlement is that corner lots had already been taken into account by way of cash allocation, ie payment in cash from total sales. The respondent however has not produced detailed accounts of such sales and since we consider that the appellant is entitled to get details of such sales to see whether corner lots have been taken into account, we order that the respondent furnish detailed accounts of the cash allocation identifying the corner lots that have been taken into account within two months of this order.

We now move into another area of entitlement this being the increased housing plots following amendments in 1983 to the 1979 layout plan. Such amendments were done in pursuance to cl 22 of the agreement which also entitles the appellant to a 12% increase of each type of buildings to be erected on the increased plots. Clause 22 is expressed in the following terms:

> It is hereby agreed between the parties hereto that the developer shall be entitled at its sole costs and expenses to amend the layout plan to increase the number of housing plots to be subdivided from the said land PROVIDED ALWAYS that:
>
> (a) such said amendments shall not affect the area of each of the plots to be allocated to the company under cl 5 hereof and as far as possible not to effect the relative position of the same;
>
> (b) the company shall be allocated twelve percent (12%) of each type of the buildings (including corner plots) to be erected by the developer on such increased plots; ... .

At the outset, the respondent questions the propriety of the appellant to base its entitlements under cl 22(b) to the amended 1983 layout plan as there had been subsequent amendments made to the layout plan in March 1990, August 1990 and June 1992. The respondent contends that the relevant plan is the 1992 layout plan.

A comparison of the legends to the 1983 and 1992 amended layout plans, D14 and D1 shows no difference in the number of residential buildings to be constructed. The difference, if any, is in the increase and decrease of the units of shop houses. Whilst the original 1979 layout plan made provision for 226 units of 3-storey shop houses, the 1983 amended layout plan increased the number to 367. In the 1992 layout plan, the total number of 367 shop houses is maintained but, in the process of amendments, the types of such shop houses are identified to be 104 units of the double-storey type, 15 units of the three-storey type and 248 units are of the four-storey type. Apart from the difference in the types of shop houses to be built, there is therefore no difference as to the total number. The figure of 367 shop houses is still maintained in the 1992 amended layout plan. To that end, it is immaterial which layout plan is referred to as the calculation of the 12% under cl 22(b) is dependent on the number

of increased units and not in the type of the buildings. Since the appellant is happy with the 1983 layout plan, we see no reason why the respondent should object to this.

The appellant divides its entitlements under cl 22(b) into two categories: (1) the additional units; and (2) the new units which have been incorporated into the amended plan and which were not present in the original plan. In the case of the additional units, that came about when the respondent failed to construct its entitlements and when the sizes of certain buildings were decreased to accommodate the construction of more units over the same area. This is true in the case of the 600 units of double link houses that were increased to 805 units. Originally, such houses measured 22' x 75' but they were decreased to 20' x 60' in the 1983 amended plan.

The entitlement to the 12% of additional units has always been acknowledged by the respondent to be due to the appellant as can be seen from the correspondence coming from the respondent as well as an affidavit sworn by a director of the respondent to the same effect. These are found in the AR at:

(1) page 2738, vol 8, letter dated 30 October 1980;

(2) page 2186, vol 6, letter dated 12 April 1984;

(3) page 2250, vol 6, letter dated 30 October 1984;

(4) page 1148, vol 3, letter dated 19 November 1984; and

(5) pages 1466–1479, vol 4, affidavit sworn on 19 February 1986 at para 12.3.

In the court below, the respondent raised two objections:

(1) That the 12% increase is limited to housing plots only as specified by cl 22(b) and therefore does not cover any increase in shop houses which is commercial in nature;

(2) That such increase must come from common land and not a saving derived for not building on its entitlements.

Happily, the respondent has dropped its first objection before us and in rebuttal to the second objection the appellant maintains that cl 22 contains no condition that the increase must come from common land. This is true especially in the case of the number of low cost houses to be constructed. Originally, it was 3,350 units of which 1,105 units would be allotted to the appellant under cl 5(a) item 1. This would mean that the respondent would enjoy 2,245 units. In 1983, following the amendments, the number of low cost houses was decreased to 2,671 units of which the appellant was still entitled to its allocation of 1,105 units under cl 5(a) and the respondent 1,566 units. The respondent however did not build its entitlement of 1,566 units but built light industrial units instead and it is this saving that the respondent now regards as being a saving of its own entitlement and not a saving derived from common land.

DW1, the development and co-ordination manager of the respondent describes this saving as a drop in the respondent's entitlement for which the appellant maintains the respondent has been adequately compensated as all 836 units of three-storey compact houses had been retained by the respondent. This is clear from the summary of the appellant's entitlements prepared by the respondent appearing at p 1803, vol 5 of the AR ('the summary'). Additionally, in the allocation of the low cost houses, more units of the higher priced Type B were retained by the respondent whilst the appellant was allocated more of the lower priced Type A. The fact that there was a drop in the respondent's entitlement to the low cost houses meant that there was a drop in its entitlement to sell such houses at a higher price but this cannot be faulted to the appellant as the drop of entitlement was very much the respondent's own doing for not building its entitlement. By choosing to build light industrial units instead, the respondent must have contemplated that more profits would be derived from constructing this type of commercial buildings than the low cost houses.

In the light of the respondent's own documents that we have listed above and the legends of the 1979 and 1983 layout plans, we confirm the appellant's entitlement of a 12% increase under cl 22(b) to be as follows:

(1) *Low cost flats*

Under the original plan, 800 units were to be constructed but this number was increased to 2,640 units following the amendments. This has resulted in an increase of 1,840 units and 12% of this is 221 units. For the whole project, the appellant's entitlement are as follows:

(1)	Under cl 5(a) item 3, it is	264 units
(2)	Under cl 22(b), there is an additional	221 units
	Total	485 units

That same total has been reflected by the summary.

The 264 units under cl 5(a) item 3 have been delivered to the appellant in 1992 and a further two units subsequently, thereby leaving a balance of 219 units. We order that the respondent deliver the said 219 units of low costs flats to the appellant or in lieu thereof their sales value which the respondent has fixed at RM75,000 per unit as seen from the summary and calculating it on the formula of 219 x RM75,000, the appellant is entitled to RM16,425,000.

(2) *Double-storey link houses*

The respondent has already delivered all the units due to the appellant inclusive of the 12% additional units. This is yet another instance where the respondent by its own conduct has admitted that the appellant is also entitled to a 12% increase of all additional units of buildings constructed following the amendments to the original approved plan.

(3) *Shop houses*

There has been an increase of 141 units of shop houses following the amendments. Originally, 226 units were to be constructed but the figure grew to 367, thereby resulting in there being an increase of 141 units and 12% of this entitles the appellant to another 17 more units over and above the 79 which we have confirmed have already been allotted to the appellant under cl 59(a) item 5. The total entitlement of 96 units [79 under cl 5(a) item 5 and 17 under cl 22(b)] is also reflected in the summary. We accordingly order that the respondent deliver 17 more units of the four-storey shop houses to the appellant or in lieu thereof their sales value which the respondent has worked out to be at RM450,000 per unit (see the summary). This gives a total of 17 x RM450,000 = RM7,650,000.

We now come to the claim for new units which falls into two categories, luxury apartments and light industrial units. The luxury apartments have been constructed following a saving of public utility land and the light industrial units on a saving in the decrease of the low cost houses. The appellant makes this claim on the basis of 33% entitlement for the residential units and 35% for the commercial units. Whilst the appellant is aware that this claim is not specifically provided for by the joint venture agreement, nonetheless it considers the claim to be justified as the respondent being the other joint venturer cannot retain any collateral advantage at the expense of the appellant. Their relationship is one of openness and the respondent is required by law to act honestly, fairly and justly in the implementation of the agreement. It is for this reason that the respondent cannot profit alone and this is more so when the new units, particularly the luxury apartments, were constructed on land contributed to by the appellant.

We had earlier on in this judgment confirmed that there has been a saving of 16.8 acres of public utility land which, under the clear provisions of cl 5(d)(iii), should be allocated to the appellant. However, bearing in mind the nature of the joint venture that the parties had entered into, it is clear that the appellant was not to retain any part of the land but that the whole area of approximately 584 acres was surrendered to the respondent to be developed fully. It is for this very reason that the 16.8 acres of utility land saved could not be transferred back to the appellant but that it would be utilised by the respondent to construct more buildings and it did so with the construction of 1,600 luxury apartments. To that end, it cannot be denied that there was a contribution made by the appellant when the 16.8 acres of utility land saved were utilised by the respondent with the construction of the 1,600 luxury apartments.

Turning to the light industrial units, these are made up of:

(1) 103 units measuring 30' x 90';

(2) 35 units measuring 90' x 120';

(3) one shopping complex;

(4) one 'Medan Selera'; and

(5) one covered car park.

However, we notice that the 35 light industrial units measuring 90' x 120', item (2) above, are no longer reflected in the legend of the 1992 layout plan and we take this to mean that the respondent will not construct them.

The respondent's objections to the remainder of this claim can be summarized as follows:

(1) Since there is no distinction between 'increase' and 'new' units, the appellant's entitlement must fall within cl 22(b) if at all;

(2) Since the 1,600 luxury apartments are constructed on 16.9 acres, this being a saving of public utility land, the appellant is only entitled to 12% pursuant to cl 22(b) and not 33% as maintained by the appellant; and

(3) The covered car park is not a 'new' unit as it is public utility and which will be surrendered to the state authority in compliance with the terms of approval for conversion of the land.

Whilst we disagree with the respondent that the covered car park is not a 'new' unit, we are however in agreement with the respondent that the appellant is not entitled to it as it is public utility over which only the state authority has control.

By the very nature of the joint venture agreement, we consider that the appellant cannot be denied its entitlement to new units constructed on areas saved by the respondent and denial of such entitlement is in itself evidence of a breach of the respondent's fiduciary duties to distribute all profits earned from the joint venture agreement to the appellant. But what is the extent of the appellant's entitlements? Is it 12% under cl 22(b) as maintained by the respondent or 33% and 35% under cl 5(a) as contended by the appellant?

Clause 22(b) speaks of 'increased' units and this must of necessity be additional units of the particular types of buildings to be constructed as described and identified by the legend in the original layout plan. The 1983 amendments introduced new types of residential and commercial buildings not found in the original layout plan. These took the form of the luxury flats and the light industrial units. Since cl 22(b) makes provisions for increased or additional units only, the extent of entitlement for new units is not covered by that clause. However, PW1, the appellant's managing director, who testified in the first trial stated that in the negotiations leading to the execution of the joint venture agreement, he had raised the extent of the appellant's entitlements of the project with the respondent's two directors and he was assured by them 'that 33% residential and 35% commercial buildings would be allocated to Sri Alam. It was also discussed that if layout plan was changed and the units increased, Sri Alam would receive 12%'. Thus, from the very beginning there was a clear indication that there was to be a distinction between 'increased' and 'new' units and the rates of entitlement applicable to such units. That same arrangement was later confirmed by the respondent in its letter dated 30 October 1980 appearing at p 2738, vol 8 of the AR when it reviewed the current status

of the project then. In 1986, the same arrangement was reconfirmed by one Chan Teik Huat, a director of the respondent in his affidavit sworn on 19 February at paras 12(2) and (3) in the following manner:

> 12 (2) The defendant says that the plaintiff's entitlement to 33% of all residential buildings and 35% of all commercial buildings is based on cl 5(a) of the joint venture agreement ...
>
> 12 (3) The plaintiff is entitled to 12% of additional lots as this is governed by cl 22(b) of the joint venture agreement.

The affidavit appears at pp 1466–1479, vol 4 of the AR.

Looking at the appellant's entitlements as set out by cl 5(a), it is clear that the different entitlements for the residential and commercial buildings have been calculated on the basis of 33% and 35% respectively. Likewise, we do the same for the luxury apartments and light residential units and since their sale values have been computed by the Inland Revenue Department, we take their figures when calculating the values of the appellant's entitlements for the new units except for the 'Medan Selera' for which no value has been given.

Types of new units	Total No	Percentage entitlement/ New units	Sale value of new per unit RM	Total sale value of RM
(1) Luxury apartments	1,600	33%/528	200,000	105,600,000
(2) Light industry (30' x 90')	103	35%/36	600,000	21,600,000
(3) Shopping complex	1	35%	—	3,284,000
(4) 'Medan Selera'	1	35%	Unknown	Unknown

The appellant is also claiming the penalty payable under cl 21 of the joint venture agreement for late delivery of all units it is entitled to under the agreement. Clause 21 must be read together with cl 12(e) which provides as follows:

> 12 The developer hereby undertakes and agrees with the company that it shall:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) commence development works on the said land within six (6) months from its obtaining all the requisite approval and licences for the housing development on the said land and in any event to complete all the buildings on the plots to be allocated to the company within eight (8) years from date hereof.

Clause 21 however allows the respondent a fair extension of time to complete construction of all the appellant's entitlements on the happening of one or more events as set by that clause and which is expressed as follows:

> 21 In the event that the developer shall fail to complete the development on the plots to be allocated to the purchaser hereof within eight (8) years period as specified in cl 12(e) hereof (unless a fair extension of time is allowed by the architect for the project by virtue of force majeure, inclement weather, civil commotion, shortages of building materials or of construction workers or changes, deviations alterations in extra works required by the appropriate authorities or by the company) then the developer shall pay to the company damages for the delay in completion of each unit of the buildings remaining to be erected on such said plots interest at the rate of ten per centum (10%) per annum from the expiry of the said eight (8) years or as extended by the said architect on its market value thereof until completion of the same WITHOUT PREJUDICE HOWEVER to the right of the company at any time after the expiry of the said eight (8) years period or as extended to terminate this agreement ... .

Thus, by virtue of cl 12(e) the respondent is obliged to deliver all the appellant's allocations under the agreement by 2 October 1988. By October 1987, the respondent must have realized that it was not possible to complete construction of all the appellant's entitlements within the time limited by the agreement and by letter dated 16 October 1987, it wrote to its architect, setting out the reasons and problems why the project was delayed and seeking the latter's advice about getting a fair extension of time.

By letter dated 2 February 1988, the architect confirmed that in his professional opinion, considering the various problems faced by the respondent, he considered that a 63 months or 5¼ years extension to be reasonable and identified the following three reasons for such an extension:

(1)	Additional work for extra housing units	36 months
(2)	Deviations by approving authorities	12 months
(3)	Alterations required by approving authorities	15 months
	Total	63 months

The appellant was accordingly notified of the extension by way of the respondent's letter dated 3 February 1988.

It is the appellant's contention that in the implementation of cl 21, the respondent had not acted in good faith as the first reason given for the extension, ie 36 months for the additional work for extra housing units, does not fall within any of the events specified by cl 21. As for the 27 months extension for the deviation and alteration works approved by the authorities, whilst admitting that such events fall within the events specified by cl 21, nonetheless, the appellant questions the necessity of providing two periods of extension as the deviations and alterations could

be done simultaneously. The appellant suggests that a maximum of 15 months extension is reasonable to put into effect the additional works for the extra housing units, the deviations and the alterations. Giving the completion or cut-off date to be 2 January 1990, the appellant then proceeded to assess the penalty payable under cl 21 on all units delivered after that date and units yet to be delivered.

The respondent takes issue upon this claim based on the following grounds:

(1) it is premature as at the time of the filing of this action on 2 October 1985, the cause of action had not accrued. The same conclusion is reached if one accepts the appellant's completion date to be 2 January 1990; and

(2) it is not pleaded and in any event it is contractual in nature.

As we have indicated all along in this judgment, the appellant's cause of action against the respondent is not one in contract but for breaches of fiduciary duties arising out of the relationship between them as joint venturers. This has been made clear and pleaded so at paras 12 and 13 of the re-amended statement of claim. As such the entitlement to penalty under cl 21 of the agreement is not a cause of action per se in these proceedings but only the remedy or one item of entitlement due to the appellant following the Supreme Court's finding that the respondent had breached its fiduciary duties to the appellant.

Our attention was also drawn to the fact that on 27 March 1989, the appellant obtained an order to amend the statement of claim which, inter alia, included a new para 19 to the amended statement of claim pleading its entitlement to cl 21 read together with cl 12(e) of the agreement. Before us, the respondent challenges this amendment on the grounds that para 19 introduces a new cause of action which did not exist on 2 October 1985 when proceedings were first commenced and on 4 March 1987 when the statement of claim as filed pursuant to the direction made by Abdul Razak J on 11 March 1987. For this contention, the respondent relies on the case of *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 which was followed in *Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225. In *Eshelby*'s case which was a claim under a guarantee, the Official Referee who heard the case had, acting on his own initiative, allowed the plaintiff to amend his pleading by adding to his claim another sum of money which on appeal was held should not have been ordered to be made without the consent of the parties as the amendments introduced a cause of action which was non existent at the time the writ was issued.

It is clear that the amendments in *Eshelby*'s case, firstly, admit to a new cause of action for which the defendants could not be sued upon at the time the writ was issued. Secondly, the amendments were not applied for by any of the parties to the action but was ordered by the court acting on its own initiative. That situation is very far different from the one now before us. The addition of para 19 in the amended statement of claim was ordered on the application of the appellant and it does not introduce a new

cause of action but merely avers to the subsequent conduct of the respondent since the filing of the statement of claim. That conduct hinges on the issue of whether the 63 months extension given by the respondent's architect was a fair extension of time to complete all the additional works, deviations and alterations within the meaning of cl 21 read with cl 12(e) of the agreement. The appellant has alleged it was not and that the conduct of the respondent in obtaining such extension amounts to a breach of the respondent's fiduciary duty to act honestly and fairly to the appellant, its partner in the joint venture agreement. That breach has already been pleaded in the original pleadings filed in 1985 and to that end neither *Eshelby*'s case nor the other objections raised by the respondent are relevant.

Clause 21 of the agreement identifies the following events when the architect can give an extension of time:

(1) force majeure;
(2) inclement weather;
(3) civil commotion;
(4) shortage of building materials;
(5) shortage of construction workers; and
(6) changes, deviations, alterations in extra works required by the appropriate authorities or by the appellant.

In this respect, we agree with the appellant that giving an extension of 36 months for the additional works in constructing extra housing units is not one of the reasons stipulated by cl 21, and to that end the extension given by the architect for that purpose cannot be maintained.

As for the extensions of 12 months and 15 months to effect the deviations and alterations approved by the relevant authorities, there is no evidence to establish that such works can be done simultaneously as contended by the appellant. The architect who testified at both trials was never cross-examined on this and neither was he asked that 15 months was sufficient to effect the additional works, deviations and alterations. For these reasons, we consider a 27 months or 2¼ years extension is a fair extension for the purposes of effecting the extra works, deviations and alterations. That brings the completion date of the agreement to 2 January 1991 and the penalty interest if any, payable under cl 21 is to be calculated from that date until all the units allocated to the appellant have been delivered to the appellant.

Having determined so, we now have to consider whether the appellant's entitlement to penalty interest under cl 21 is a specific remedy that was intended to cover the situation when cl 12(e) has been breached, for in essence it differs in form to the appellant's other entitlements under cll 5(a), (b), (d) and 22 of the agreement. The latter entitlements refer to entitlements in specie and these take the form of the different types of buildings that have been constructed or will be constructed on the land.

The penalty interest under cl 21 is monetary in nature and it is not the only remedy available to the appellant for the respondent's breach of

cl 12(e) for additionally the appellant is also entitled to terminate the agreement and in such event the respondent is contractually liable to transfer free of all encumbrances the plots that have been allocated to the appellant. This further reinforces our argument that the penalty interest is only intended to apply when cl 12(e) has been breached, although we are mindful of the fact that the Supreme Court had already declared the respondent to be in breach of its fiduciary duties to the appellant. Penalty interest as a remedy is more appropriate to a breach of contract claim than to an equitable claim for breach of fiduciary duties. On that reasoning, we consider that the appellant is not entitled to the penalty interest under cl 21 in these proceedings.

We now come to that part of the Supreme Court order as to whether set-off can be raised as a defence by the respondent in these proceedings.

Clauses 1 and 2 of the agreement make provisions as to the consideration for the respondent's participation in the joint venture, this being an advance of RM7.5m to be paid to the appellant and which under cll 4, 6(a) and 12(i) of the agreement can be set-off by the respondent against the proceeds of sale collected by the respondent on behalf of the appellant. It is not disputed that the appellant had pre-sold some of its entitlements under cl 5(a) of the agreement and that there was an arrangement that the respondent would collect the proceeds of sale on behalf of the appellant from the many purchasers.

It was pursuant to these arrangements and the relevant provisions in the agreement that the respondent deducted or set-off a total sum of RM39,587,090.57 from the undisputed sum of RM82,617,166, collected by the respondent on behalf of the appellant. The appellant argues that such deductions cannot be made by the respondent as, firstly, there has been a finding by the trial judge that the respondent holds the proceeds of sale as a trustee for the appellant and, secondly, set-off is not available as a defence to the respondent.

The equitable defence of set-off is governed by O 18 r 17 of the RHC which reads as follows:

> Defence of set-off (O 18 r 17)
>
> 17 Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

The characteristics of a set-off have already been defined in the case of *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157, to be a cross-claim for a sum of money ascertained or otherwise by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. It is relied upon as a defence and it has the effect of extinguishing the whole or part of the plaintiff's claim. As such, it is not treated as a separate cause of action.

As set-off can only be relied upon as a defence, this must of necessity mean that it is an answer to a claim made by the plaintiff against the defendant. On the facts of the case before us, there must, firstly, have been a claim made by the appellant for the return of all proceeds of sale collected by the respondent on its behalf before the plea of set-off can be made available to the respondent. In this case, the appellant has not pleaded the return of such moneys from the respondent and this omission is sufficient to disentitle the respondent to raise set-off as a defence and in this respect we are in complete agreement with the finding of the trial judge.

Having stated thus, can the appellant get a refund of all the proceeds of sale collected by the respondent, particularly when no such claim has been pleaded by the appellant? We answer this in the affirmative as we are also in agreement with the trial judge that the respondent holds such moneys as the trustee for the appellant and coupled with the Supreme Court's finding on liability, the respondent as the trustee is duty bound to make refund of all the proceeds of sale it had collected over the years to the appellant. Discounting the fact that RM43,030,075.45 has already been paid over to the appellant, the balance after deducting that sum from RM82,617,616, amounting to RM39,587,090.57 is to be returned by the respondent to the appellant.

Finally as to the respondent's complaint that the trial judge ought not to have determined the extension of time for the delivery of the 56 semi-detached houses, we consider that the complaint has no basis as the trial judge did not make such a finding. On the contrary, he merely stated that in the event of late or non-delivery of the 56 semi-detached houses (as such houses are still under construction), the appellant's remedy lies in contract. He never determined the extension of time for the delivery of the 56 semi-detached houses.

In allowing the appellant's appeal, we also enter judgment against the respondent for the following:

(1) RM39,587,090.57 being the balance of the proceeds of sale collected by the respondent on behalf of the appellant for the sales of the appellant's units under cl 5(a) of the agreement;

(2) RM3,920,000 being the net amount due to the appellant for the 56 semi-detached houses after deducting the compensation due to the respondent under cl 5(c) of the agreement;

(3) RM1,008,000 being the value of seven bungalow lots under cl 5(b) of the agreement;

(4) RM1,078,000 representing the value of 35% of the cinema under cl 5(d)(i) of the agreement;

(5) RM3,916,000 representing the value of 35% of the supermarket under cl 5(d)(ii) of the agreement;

(6) RM3,036,000 representing the value of 35% of the wet market under cl 5(d)(ii) of the agreement;

(7) that detailed accounts of the cash allocations identifying corner lots have to be furnished to the appellant within two months hereof;

(8) delivery of 219 increased units of low cost flats under cl 22(b) of the agreement or in lieu thereof their total sales value of RM16,425,000 calculated on the formula of 219 x RM75,000;

(9) delivery of 17 increased units of four-storey shop houses under cl 22(b) of the agreement or in lieu thereof their total sales value of RM7,650,000 calculated on the formula of 17 x RM450,000;

(10) delivery of 528 units of luxury apartments representing 33% of new units of their total sales value of RM105,600,000 calculated on the formula of 528 x RM200,000;

(11) delivery of 36 units of light industrial units measuring 30' x 90' representing 35% of new light industrial units or their total sales value of RM21,600,000 calculated on the formula of 36 x RM600,000;

(12) RM3,284,000 representing 35% of one shopping complex;

(13) 35% of the 'Medan Selera';

(14) interest at 8% pa on all sums due and payable from date hereof until date of realization; and

(15) costs here and in the court below.

For the reasons that we have stated, we also dismiss the respondent's cross-appeal with costs and order that the deposit made by the appellant be refunded to it.

3 July 1996

Abdul Malek Ahmad JCA: The appellant had earlier filed Kuala Lumpur High Court Civil Suit No 30/85 against the respondent and four others claiming against the respondent for an account of all sums belonging to the appellant in the possession of or converted by the respondent, an injunction perpetually to restrain the respondent from selling, transferring, disposing of or encumbering such number of buildings and the land thereof as are lawfully due to the appellant and are under construction or to be constructed upon the said land and a mandatory injunction compelling the respondent to transfer to the appellant all buildings and the land thereof to which the appellant is lawfully entitled.

On 10 January 1985, the appellant had filed a notice of motion in that suit seeking injunctions against the respondent and four others but on the 21 January 1985, a consent order was made before Abdul Razak J staying the action upon certain terms, one of which required the appellant to apply to the court for an appropriate construction and interpretation of the joint venture agreement as to the respective entitlements of the parties thereunder, with liberty to the appellant to lead evidence on the existence or otherwise of a collateral contract and without prejudice to the rights of the respondent in respect thereto. That had resulted in the filing or Originating Summons No C 189/85 on 2 October 1985.

On 16 January 1986, the respondent took out a summons in chambers to strike out the appellant's originating summons. By consent, however, the parties agreed to narrow down the relevant issues and this was followed by an exchange of not less than 11 affidavits by both parties. The same judge had called for two meetings after that. The first was on 17 November 1986 when he directed that, since the dispute related to facts which were seriously disputed, the parties should exchange pleadings. At the second meeting on 11 March 1987, he ordered the appellant to file a statement of claim and the respondent to file a statement of defence and counterclaim which were filed on 27 March 1989 and 28 November 1989 respectively. On 24 January 1990, the appellant filed his re-amended reply and re-amended defence to set off the amended counterclaim. On 19 June 1987, it was ordered, after summons for directions were filed, that the suit would be set down for trial within 30 days thereof.

The respondent had then applied to dismiss the appellant's action against them on two grounds, namely that the appellant was suing for payment of money while the contract was being performed and that the appellant had not referred the dispute between the parties to arbitration. This was heard on 27 November 1990 and Anuar J (as he then was) had dismissed the said application on 21 March 1991. On appeal, the Supreme Court (Jemuri Serjan CJ (Borneo), Harun Hashim dan Yusof Mohamad SCJJ) had on 18 October 1991 decided that there were several issues which must be proved by extrinsic evidence (see [1991] 3 MLJ 474). As such, these were matters that ought to be tried at the trial proper and cannot be decided by recourse to O 33 r 2 read together with O 18 r 11 of the Rules of the High Court 1980 ('the RHC'). Further, the respondent had not objected to the recourse to the court by the appellant and had taken various steps in the proceedings and had even agreed for the case to be set down for trial. They added that the application for stay pending arbitration would have failed even if it was applied for by the respondent.

It is pertinent for our purpose to reproduce an excerpt from the speech of Jemuri Serjan CJ (Borneo) where he said (at pp 474–480):

> We would, with respect, accept this proposition which goes to show that the if agreement of 2 October 1980 entered into by the litigating parties is indeed a joint venture agreement then their relationship is a fiduciary one. The question of the extent of the fiduciary obligations in this case, therefore, cannot be determined by submissions alone before us but must be ascertained from oral evidence as well as minute scrutiny of the relevant documents.

Anuar J accordingly conducted the trial over a period of 33 days and dismissed the suit on 14 October 1992 on holding that there was no fiduciary relationship existing between the parties and that the action should be based on breach of contract. The appellant had appealed to the Supreme Court (Gunn Chit Tuan CJ (Malaya), Azmi and Mohd Dzaiddin SCJJ) which ruled on 4 December 1993 as follows:

(1) Appeal of appellant is allowed.

(2) Order of the trial judge in dismissing plaintiff's claim is reversed and set aside. Judgment is hereby entered for the appellant on liability.

(3) Case is remitted for trial before another High Court judge to determine the extent of the fiduciary duties in this case and any breach thereof, and to assess what sums of money or other entitlement, if any, which the appellant is entitled to receive from the respondent, and to make all consequential orders.

(4) Appeal against counterclaim is also allowed and the High Court is to determine any set-off.

(5) Half costs to appellant here and below.

NH Chan J (as he then was) subsequently heard the matter over a period of 31 days from 14 January 1994 to 30 August 1995 and on 20 September 1995 had dismissed the appellant's action with costs. Hence this appeal.

The learned trial judge had taken the view that the orders of the Supreme Court had caused some confusion because despite finding liability on the part of the respondent, it had directed the High Court to determine the extent of the fiduciary duty owed by the respondent to the appellant and whether there was any breach thereof and if so, what was the amount the appellant was entitled to receive from the respondent.

He had said:

> It is not easy to understand the order of the Supreme Court. In one breath, by order (2), it says, 'Judgment is hereby entered for the appellant on liability' which in effect is granting the declaration sought by the plaintiff.
>
> The plaintiff had claimed for 'a declaration that the defendant has acted in breach of its fiduciary duties.' In the next breath, by order (3) the Supreme Court orders the case to be sent back to the High Court for trial 'to determine the extent of the fiduciary duties in this case and any breach thereof.'
>
> If judgment had been given for the plaintiff against the defendant for breach of fiduciary duty, then, there would be no need to remit the case to the High Court to determine if there was a breach of fiduciary duty by the defendant. There could not be a judgment on liability in a fiduciary relationship case unless there had been a breach of fiduciary duty. If the breach had already been determined by the judgment on liability as stated in order (2), then, it would be superfluous to ask the High Court, as stated in order (3), to determine 'any breach thereof' of the fiduciary duties, the extent or scope of which, in any case, has yet to be determined by the court.
>
> I think the words in order (2) that 'judgment is hereby entered for the appellant on liability' are unnecessary, otherwise, order (3) will have no meaning. They should be disregarded as they made order (2) inconsistent with order (3).
>
> There is another way of looking at order (2). It could mean 'judgment is hereby entered for the appellant on liability' as a fiduciary, so that when we come to order (3), we can 'determine the extent of the fiduciary duties in this case and any breach thereof'. But that seems like a *non sequitur* because it means that the Supreme Court, despite after having found that there was liability against the defendant (which could only be so if there had been a breach of a fiduciary duty), is still asking the High Court to determine if there was a breach of a fiduciary duty all over again.

As demonstrated above, it is only where order (2) is otiose that order (3) can be proceeded with. If order (2) was to prevail over order (3), then order (3) would be superfluous because it would no longer serve any useful purpose for the High Court to determine if there was a breach of fiduciary duty.

The upshot of all this is that only order (3) prevails when the case is remitted for trial before another judge of the High Court who is to determine the extent or scope of the fiduciary duties owed by the defendant in this case and any breach of them by the defendant, and to assess the sums (if any) which may be found due to the plaintiff. Thus, it has fallen on me as the judge who has been appointed by the then Chief Justice to determine these issues, and the scope of my enquiry is only confined to the terms of order (3) plus the consideration whether set-off as a defence is available to the defendant as stated in order (4).

Having heard the action, he had concluded that this was a straight forward commercial transaction between a housing or property developer and the proprietor of land. And having scrutinized the relevant agreement, he found that the contract, even though described as a joint venture agreement by the parties, did not exhibit the normal attributes of a partnership. He had also stated that in his judgment, there is no partnership and the respondent is not a fiduciary as a partner in a partnership is a fiduciary towards his co-partners. He, however, said that the respondent is in relation to cl 5(a) of the agreement a trustee and as such trustee is a fiduciary to the appellant, but as only item 7 of the appellant's entitlement in that clause had not been delivered, the appellant's remedy would lie in contract probably on a claim for damages for breach of contract for late or non-delivery or for specific performance. He found that there is not a shred of evidence to show that the respondent had made a profit from its trust out of the remaining units which had yet to be delivered and therefore did not breach its duty as a fiduciary and this applied to cl 5(b) as well.

At p 29 of his judgment, he had stated:

Therefore, confining myself to order (3), I am statisfied that there is no evidence whatsoever that the defendant had made a profit by means of its position or by means of property held by it for the plaintiff. I find that the defendant had not breached its fiduciary duty. As fiduciary, the defendant has to disgorge all profits which it had made by means of its position or by means of property held by it. There is not a title of evidence that profits have been made by the defendant by such means.

The duty of a fiduciary not to profit from his position as a fiduciary is an inflexible rule of equity and it depends not on fraud or absence of bona fide, but on the mere fact of a profit made.

It was also his view that in respect of the terms in cll 5 and 22, the claims that could have been made against the respondent are contractual in nature. Since there are no pleadings for those claims, he did not have to express any opinion on them. In any case, these are outside the scope of his inquiry as ordered by the Supreme Court. As for the set-off, he had stated that that defence is available in answer to the whole or part of a claim made

by the appellant, but as the appellant had not made a claim for the money collected on its behalf by the respondent from the appellant's purchasers in their statement of claim, the defence of set-off is not available to the respondent in the present case.

The appeal before us is to examine whether the trial judge the second time around had made the correct decision. We have examined the matter very carefully and our task had been made more difficult by the fact that despite being an appellate tribunal, we had to scrutinize the assessment of damages allegedly due from one party to another as though we were hearing the matter at first instance.

I have read the judgment of my learned sister Siti Norma Yaakob JCA and totally agree with her findings in particular her conclusions concerning the calculations on the contested claims. It is, however, disheartening to note that the litigation had dragged on far too long and to know that while the parties to the joint venture are still fighting it out in court, the area in question had been plagued by severe flooding twice in the last nine months. The appeal is allowed for the amounts stated with costs here and below and the deposit is to be refunded to the appellant. As for the respondent's cross-appeal, it is dismissed with costs.

16 July 1996

Siti Norma Yaakob JCA: Following our judgment in this appeal, counsel for the appellant had requested for a hearing to seek clarifications on certain aspects of the judgment entered against the respondent on 3 July 1996.

Confining himself to clarifications only, Mr Manoharan, learned counsel for the appellant submitted on the following three matters:

(1) There should be a specific interest chargeable to run from a specific period on the balance of the proceeds of sale collected by the respondent on behalf of the appellant which is not reflected in para (1) at p 332 of the judgment.

Since this had been asked for and submitted at the hearing of the appeal, we had accordingly included that interest at 8% pa calculated from the dates of collection to the date of realization be chargeable on the balance of the proceeds of sale.

(2) For para (7) at p 333 of the judgment, there should also be a direction that after detailed accounts of cash allocations identifying corner lots have been furnished by the respondent and money is found to be due to the appellant, such moneys be paid to the appellant.

Considering the likelihood that moneys may well be due to the appellant after detailed accounts of the corner lots have been determined, we accordingly direct that the respondent pay out such money to the appellant within three months after the expiry of the two months limited for furnishing the detailed accounts.

(3) In respect of paras (8)–(11) at p 333 of the judgment, there is a need to specify the time frame within which the specific buildings have to be delivered before their calculated sale values can be enforced.

In recognizing the fact that we had included alternatives by way of the expression 'in lieu thereof' and had calculated the sales value of specific buildings at paras (8)–(11) we consider three months from the date of the judgment to be sufficient within which delivery had to be made before the calculated sale values of the specific building can be enforced.

(4) Lastly, para (14) at p 333 of the judgment has to be clarified in view of the interest already provided for in para (1) by the addition of the words 'for which no interest has been specified' to that paragraph.

To that end, our judgment at paras (1), (7), (8)–(11) and (14) appearing at pp 332–333 are clarified and those paragraphs now read as follows:

(1) RM39,587,090.57 being the balance of the proceeds of sale collected by the respondent on behalf of the appellant for the sales of the appellant's units under cl 5(a) of the agreement with interest at 8% pa from the dates of collection to the date of realization;

(7) that detailed accounts of the cash allocations identifying corner lots have to be furnished to the appellant within two months hereof and if there is any money found to be due, the respondent shall pay such moneys to the appellant within three months after the expiry of the time limited for furnishing the detailed accounts;

(8) delivery of 219 increased units of low cost flats under cl 22(b) of the agreement, such delivery to be effected within three months from date hereof or in lieu thereof their total sales value of RM16,425,000 calculated on the formula of 219 x RM75,000;

(9) delivery of 17 increased units of four-storey shop houses under cl 22(b) of the agreement, such delivery to be effected within three months from date hereof or in lieu thereof their total sales value of RM7,650,000 calculated on the formula of 17 x RM450,000;

(10) delivery of 528 units of luxury apartments representing 33% of new units, such delivery to be effected within three months from date hereof or in lieu thereof their total sales value of RM105,600,000 calculated on the formula of 528 x RM200,000;

(11) delivery of 36 units of light industrial units measuring 30' x 90' representing 35% of new light industrial units, such delivery to be effected within three monts from date hereof or in lieu thereof their total sales value of RM21,600.000 calculated on the formula of 36 x RM600,000; and

(14) interest at 8% pa on all sums due and payable, and for which no interest has been specified, from date hereof until date of realization.

We further confirm the other paragraphs in the judgment are in no way disturbed by the above clarifications.

A Before we adjourned, En Mohd Ismail, learned counsel for the respondent had orally applied for an interim stay of the judgment pending a formal application being filed by him. We declined to exercise our discretion as the respondent had two weeks before this hearing to do just that, ie to file a formal application. We hasten to add that our refusal to
B grant an interim stay does not bar the respondent from filing a formal application to that effect.

Appeal allowed.

Reported by K Tang-Wai

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